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GENERAL COUNSEL'S OPINION NUMBER 57-1, DATED 1 March 1957

Requirements for the Use of U. S. Flag Vessels. Comptroller General has ruled that excessive cost alone is not sufficient reason for the use of foreign vessels although delay may be justification.

TO THE CHIEF, EE DIVISION

1. This is to follow up our memorandum of 27 February on the same subject. In that memorandum we recommended rescission of the Station policy on accommodations on ships pending further study of the problem and final recommendations.

2. A Station Memorandum dated 17 December 1956 prescribes a policy that employees who are not able to obtain first class accommodations on U. S. vessels at a cost not in excess of \$580 per adult person will personally pay any excess costs incurred or are free to seek less expensive minimum first class available accommodations on foreign vessels.

3. The policy set forth above is not in accordance with law. (Section 901 of the Merchant Marine Act of 1936, 46 USC 1241) That Act requires Government employees to travel by ships registered under the laws of the United States unless an employee's mission requires the use of a foreign vessel. It has been interpreted a number of times in decisions of the Comptroller General. In all cases the ruling has been that excessive cost alone is not sufficient reason for traveling on foreign flag vessels when U. S. flag vessels are available.

4. Upon learning of the policy prescribed by the Station, this Office began a further study of the problem. We have discussed it with representatives of the General Counsel's Office of GAO and of the Office of the Legal Advisor of the Department of State. GAO advises that they are without authority to authorize deviations from the provisions of the Merchant Marine Act. Many cases have been brought up by different agencies of the Government where a substantial saving in cost would result from the use of foreign flag vessels. They cited a recent case where, because of the availability of counterpart funds which could be used to pay for travel on a foreign flag vessel, the cost to the Government if a U. S. flag vessel were used would be ten times the cost of passage on a foreign ship. Even in that case the Comptroller General was forced to rule that a U. S. flag vessel must be used.

5. In discussing the problem with GAO, we called their attention to the decision cited in paragraph 1 of your memorandum of 6 February 1957. (B-106864, 31 Comp. Gen. 351). In that decision, in answer to a question put by the Secretary of State (question 6), the Comptroller General said that the Department might authorize shipment of household goods from Germany to India by foreign vessels where the freight and handling costs for trans-shipment to an American vessel would result in doubling the cost. GAO admitted that on its face the answer to the Secretary's question appeared to be at variance with all previous decisions. However, they called attention to the

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fact that the statement of facts as put by the Secretary of State included as a reason for using foreign vessels the fact that a longer period of transit would be involved if American flag vessels were used. In authorizing exceptions to the rule requiring use of American flag vessels the Comptroller General has often done so on the basis of excessive cost and delay. (Emphasis supplied) Excessive cost alone has never been considered sufficient reason for the use of foreign vessels.

6. In your memorandum of 6 February, you state in paragraph 1 that the determination by the Station to authorize the use of foreign vessels under certain circumstances "was made after a study of the price schedules of American lines servicing the German area to establish a point at which the costs of accommodations are so high that the uses of lowest price first class accommodations actually available involves 'excessive extra cost and delay' to a degree warranting the use of foreign vessels." Unfortunately there appears to be no finding of "delay" but merely one of "excessive cost." The phrase is used in the cited Comptroller General decision, and has been used in all similar decisions, in the conjunctive.

7. Inasmuch as the policy of the Station has been prescribed on the basis of excessive cost alone it is not in accordance with law and must be rescinded. It is faulty on two points. First, it would require employees to personally pay any excess cost incurred in travel on U. S. vessels if they were unable to obtain accommodations for less than \$580. The legal and regulatory authorities under which employees are reimbursed entitle them to the actual cost of their accommodations as long as they use the lowest first class accommodations available. It is not appropriate for an Agency station to attempt to amend statutes and regulations in this way. Secondly, the Station policy states that employees unable to obtain accommodations at less than \$580 are free to seek less expensive accommodations on foreign vessels. For the reasons stated in the previous paragraphs the Agency cannot permit employees to travel by foreign vessels when U. S. vessels are available. Consequently, the Station is without authority to make the policy set forth in the cited memorandum. An employee relying on that policy would bear the burden of the errors therein since the cost of his travel on a foreign vessel when a U. S. vessel was available would be a personal expense to him.

STATOTHR 8. For various reasons which we will not go into here, the law concerned in this problem is extremely inflexible and, furthermore, is unlikely to be amended or repealed in the foreseeable future.

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9. The best solution to the problem would seem to be that used by the Department of State. They advise that they have obtained the cooperation of American shipping lines in reserving blocks of space on all sailings in accordance with the normal needs of the Department. As a result, an employee of the Foreign Service, who applies for accommodations a reasonable length of time prior to departure, will normally be given reasonably priced first class accommodations. Chief, OL/TD, is of the opinion that the Agency could make similar arrangements and that, in any event, the possibility deserves study. A copy of this memorandum has been sent to him.

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